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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

D. L. ORDERS, W. R. WILKINSON, JACKIE PARMINTER, WARNER C. USELTON, JR., JACK PESGROVE, HAROLD WALLACE, HARVEY JENKINS, FRED E. PERSON, JR., PRESTON LEE DUNN, CHARLEY JONES, JOHN W. BLANTON, FOR THEMSELVES AND ALL OTHER NON-MINORITY EMPLOYEES OF THE MEMPHIS FIRE DEPARTMENT, SIMILARLY SITUATED,

PETITIONERS,

V.

CARL W. STOTTS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, FRED JONES, AND MEMPHIS FIRE DEPARTMENT, ROBERT W. WALKER, CITY OF MEMPHIS, JOSEPH SABATINI,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

In a race discrimination suit by minority employees against their employer, when does the employer's interest become adverse to the interests of non-minority employees so as to render the employer's representation of non-minority employee interests inadequate and trigger the right of the non-minority employees to intervene under Rule 24 of the Federal Rules of Civil Procedure?

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

D. L. Orders, et al., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

QUESTION PRESENTED

In a race discrimination suit by minority employees against their employer, when does the employer's interest become adverse to the interests of non-minority employees so as to render the employer's representation of non-minority employee interests inadequate and trigger the right of the non-minority employees to intervene under Rule 24 of the Federal Rules of Civil Procedure?

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Tennessee is not published but is reprinted as Appendix D to this petition. The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 679 F.2d 579 (6th Cir. 1982) and is reprinted as Appendix A to this petition.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on May 7, 1982 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Rule 24 of the Federal Rules of Civil Procedure states in pertinent part:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or

defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its di cretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

STATEMENT OF THE CASE

Introduction

Petitioners are a group of eleven white employees of the Memphis Fire Department, informally called "Firefighters for a More Appropriate Remedy". They petitioned for leave to intervene "on behalf of themselves and all other non-minority employees of the Memphis Fire Department, similarly situated", in a class action brought by black firefighters. The black firefighters' suit alleged racial

discrimination in the Fire Department's hiring and promotion practices in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as amended by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261, March 24, 1972); 42 U.S.C. §1981 and 42 U.S.C. §1983. Soon after petitioners learned that their employer, the defendant City Fire Department, had agreed to settle the case by consent decree, they sought intervention for the limited purpose of shaping a less burdensome remedy than the remedy proposed in the consent decree.

Both the minority class representatives and the City Fire Department opposed intervention. On May 16, 1980, the district court denied petitioners' motion as untimely. Petitioners challenged denial of their motion, which they had filed before the

district court had finally approved the consent decree, but a sharply divided court of appeals affirmed the district court decision on May 7, 1982. Petitioners seek review by this Court because they believe that they, and all non-minority employees, are entitled to adequate representation in settlements of racial discrimination in employment suits and that immediate review is important to the national interest.

Statement of Facts

On November 27, 1974, the United States Department of Justice and the City of Memphis entered a consent decree which terminated a suit brought by the Attorney General to enforce the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. In the 1974 decree, the City denied the government's charges of past sex and race

discrimination, but agreed to establish goals for hiring more blacks and women in numbers "approximating [their] respective proportions in the civilian labor force". As an interim goal, the City also promised to attempt to fill at least fifty percent of all City vacancies with qualified black applicants. The decree applied to various City agencies, including the Fire Department.

On February 16, 1977, Carl Stotts, a black Captain, sued the Fire Department, alleging that he and other similarly situated blacks had been denied promotions because of their race. After discovery had been taken, the district court certified the Stotts suit as a class action. On June 19, 1979, Fred Jones, a black Private, brought an individual action against the Fire Department, alleging that the Department

had not promoted him to Fire Inspector because of his race.

Three months after Jones filed his complaint, the district court consolidated the two Fire Department cases for trial. In December of 1979, the plaintiffs requested and received an order temporarily restraining all imminent promotions of blacks and whites in the Department's Fire Prevention Bureau, to prevent "irreparable injury" to black employees. Nineteen promotions in the Bureau were postponed until February 7, 1980, a tentative trial date.

The case did not go to trial on February 7 and the litigants informed the district court on February 25, 1980, that they were negotiating the terms of a consent decree to settle their dispute. Two months later, the court held a hearing and conditionally approved a proposed agreement submitted by the Fire

Department and the black firefighters. The district court ordered the parties to post a copy of the proposed settlement in each City firehouse until May 12, 1980, to allow class members fifteen days in which to review its contents and to file any objections with the court. At this hearing the court asked counsel for the Department whether he expected anyone to object to the decree. Counsel replied that the firefighters' union might object.

No objections were filed by class members or the union within the fifteen-day period. However, on May 12, 1980, petitioners filed their motion to intervene in their own right and as representatives of non-minority employees. Petitioners feared that the proposed decree threatened their interests because the Department had agreed to institute an affirmative action

plan whereby twenty percent of all future promotions would be filled by minority employees.

On May 16, 1980, the district court held a hearing at which petitioners stated their case for intervention. They emphasized that they did not object to entry of the decree, nor did they seek to delay implementation of those provisions that remedied any proven past discrimination against black employees. Petitioners challenged the decree only to the extent that it might unnecessarily hamper or foreclose future promotions of qualified white employees. To protect their "important interest" in the matter, petitioners sought intervention as an opportunity to present and explore alternative remedies that would place the burden of remedying any past discrimination on the wrongdoer - the Fire Department - rather than on innocent

non-minority employees. One possible remedy advanced by petitioners to distribute the burden more equitably was front pay and constructive promotion for white firefighters. Petitioners also suggested monetary relief or Department reorganization as alternatives which might prove less burdensome. The only immediate relief petitioners requested was postponement of the twenty percent future promotions provision at least until its adverse impact on non-minority firefighters could be examined and less burdensome alternative remedies could be explored.

Petitioners also argued that their motion was timely, because they filed it only two weeks after they first learned that the Department had negotiated a settlement which would impair their interests and those of all other non-minority firefighters. Until petitioners

saw the notices posted in the firehouses, they had no indication that the Department was no longer "hotly contesting" the litigation. All eleven applicants stated that they were never formally notified about either the underlying litigation or the settlement negotiations. As proof that the Department inadequately represented their interests, both by deciding to settle the case and in drafting the substantive provisions of the consent decree, petitioners offered several affidavits which revealed that the City Attorney admitted to them that the case was settled simply to save the City money.

At the hearing on the motion to intervene, both the Department and the plaintiffs voiced their opposition to the proposed intervention. The district court denied the motion.

The District Court Decision

In denying the motion to intervene, the district court made the following observations:

> [O]ne of the factors is whether it is going to delay the relief that will be achieved by trial or settlement or whatever it is, and this case has had a good bit of impact on the Fire Department. I have issued some injunctive relief that the City has -that has caused the City to appear in court and assert to the court that necessary promotions in the Fire Department were being held up because of this litigation . . . . and also I think that there is a good bit of value to be obtained, certainly as far as the minority people, of going ahead and getting this thing over with.
>
> Now I don't care when we do it. Somebody is going to be unhappy. And I would not be a party to any of this constructive promotion bit. That's not much good for anybody. And it is certainly not good -well, that's no way to run a fire department, and to create more top jobs is no solution. I think this relief is only a goal to be attempted,

> and it's not any ironclad requirement, and I think it is long overdue. I don't believe it would be right to let someone come in at the last minute and intervene with the implementation of this. I might also observe that I think the provisions of the consent decree are reasonable, and therefore, on the merits I see no great need to let somebody intervene.

(Appendix C, pp. 77-79).

The district court supplemented its reasons for denying intervention in a subsequent memorandum. (Appendix D, pp. 80-86). The court at all times treated the motion as one for intervention as of right under Rule 24(a)(2), and found that it was untimely because the suits had been pending for almost three years. In addition, the court reasoned that because "all promotions have been stayed since 12/5/79", petitioners have been "on notice of the pendency of [the] actions at least since that time." The court rejected the argument that timeliness

should be measured from the date the applicants for intervention first learned that a settlement was contemplated which would harm their interests. It found that "the intervenors adopted a 'wait-and-see' posture with respect to this litigation and [they] have waited too long to come forward." (Appendix D, pp. 82-85).

The Court of Appeals Decision

Petitioners appealed the district court decision and a divided Court of Appeals for the Sixth Circuit affirmed on May 7, 1982. The majority (Judge Keith joined by District Court Judge Robert M. Duncan, sitting by designation) held that the district court "afforded the proposed intervenors a full opportunity to air their objections to the 1980 decree," that the district court fully considered

alternatives to the promotion provision of the 1980 decree and rejected them as "substantively unavailable as a matter of law," and that the district court correctly ruled petitioners' motion to intervene was untimely. (Appendix A, pp. 2-13).

In a strong dissent, Judge Martin declared that the petitioners satisfied the requirements for intervention under Rule 24(a)(2) for the following reasons: (1) the white firefighters had an interest in the subject matter of the consent decree; (2) the promotional goals of the consent decree impaired this interest; and (3) the Fire Department failed to adequately represent petitioners' interest in the settlement negotiations and consent decree. Furthermore, Judge Martin determined that the district court erred in denying petitioners' motion to intervene as

untimely because it "measured promptness by an incorrect legal standard." (Appendix A, pp. 14-38).

REASONS FOR GRANTING THE WRIT

According to United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979), an affirmative action plan designed to remedy past discriminatory employment practices must not "unnecessarily trammel the interests of the white employees" involved. This Court in the Weber decision, however, reserved the right to "define in detail the line of demarcation between permissible and impermissible affirmative action plans." Id. The present case raises questions of great importance which this Court has not addressed and which urgently need resolution concerning the meaning of the Weber standard and the

meaning of Rule 24(a)(2) as applied to employment discrimination cases. The majority opinion below in effect authorizes an employer to settle an employment discrimination suit by entering into an agreement with minority employees which seeks to rectify the employer's past discriminatory practices at the expense of innocent non-minority employees' interests in future promotional opportunities. In addition, the court of appeals' decision encourages settlement of employment discrimination suits without the participation of all interested parties, particularly non-minority employees, in fashioning an appropriate remedy for past discrimination. Petitioners submit that this ruling is incorrect.

1. **Non-minority Employees Have an Absolute Right to Intervene to Represent Their Interests in Any Settlement of an Employment Discrimination Suit Brought by Minority Employees.**

Although third parties do not have an absolute right to block entry of a consent decree, they are entitled to be heard and their views are entitled to careful consideration when the original parties file a consent decree and third party rights may be abridged by the entry of such a decree. Metropolitan Housing Development Corp. v. Village of Arlington Heights, 469 F.Supp. 836, 852 (N.D. Ill. 1979), aff'd, 616 F.2d 1006 (1980). Under Rule 24(a)(2), an applicant shall be permitted to intervene in an action:

> [1] when [he] claims an interest relating to the property or transaction which is the subject of the action, [2] he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, and [3] unless [his] interest is adequately

represented by existing parties.

Petitioners in the instant case do not seek veto power over the entry of a consent decree between an employer and minority employees, but merely seek the opportunity to participate in fashioning an appropriate remedy providing equitable relief for race discrimination against blacks and to ensure the remedy will not "unnecessarily trammel the interests of the white employees". Weber, 443 U.S. at 208.

Clearly, petitioners have an interest in the subject matter of an employment discrimination action brought by minority firefighters. Although petitioners do not have a vested right to rank order selection for promotions in a particular manner or sequence, unless such an order is guaranteed by a collective bargaining agreement or by

contract, they do have an interest in protecting their promotional opportunities within the Department. This Court has recognized that non-minority employees enjoy legitimate expectations of seniority and promotions which the courts must balance against the interests of minorities in Title VII cases. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 357-76 (1977).

As the Fifth Circuit Court of Appeals recently pointed out in United States v. City of Miami, Florida, 614 F.2d 1322, 1342 (5th Cir. 1980), negotiation and compromise among all affected parties and persons provide the best hope for elimination of discrimination. Therefore, in the negotiation of a settlement of an employment discrimination suit brought by minority employees, non-minority

employees should be given "every opportunity to demonstrate that the agreement unduly burdens the interests of white employees, and to propose alternatives which are less burdensome." Id.

In keeping with the emphasis on negotiation and compromise, several courts have even permitted intervention after the entry of a consent decree in employment discrimination suits to allow those parties adversely affected by the decree to voice their views as to the propriety of the relief afforded by the decree. See, e.g., EEOC v. AT&T Co., 506 F.2d 735 (3d Cir. 1974); Alaniz v. California Processors, Inc., 73 F.R.D. 289 (N.D. Cal. 1976), aff'd, 572 F.2d 657 (9th Cir.), cert. denied, 439 U.S. 837 (1978); United States v. Allegheny-Ludlum Industries, 63 F.R.D. 1 (N.D. Ala. 1974),

aff'd, 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

Denial of intervention on the grounds that sufficient consideration was given to the would-be intervenors is appropriate only when some existing party, other than the employer, adequately represents non-minority interests in the litigation and settlement of an employment discrimination suit. See, e.g., Afro American Patrolmen's League v. Duck, 503 F.2d 294, 298 (6th Cir. 1974) (the court had already permitted fifteen non-minority patrolmen to intervene); Alaniz v. California Processors, Inc., 73 F.R.D. at 295 (the union representing non-minority interests was already a party to the suit and non-minority representatives participated fully in six days of settlement hearings); Firebird Society of New Haven, Inc. v. New Haven Board of

Fire Commissioners, 66 F.R.D. 457 (D. Conn.), aff'd, 515 F.2d 504 (2d Cir.), cert. denied, 423 U.S. 867 (1975) (seventeen non-minority employees had already intervened).

In the present case, there was no other party in the suit which could provide adequate representation of the legitimate interests of non-minority employees in future promotional opportunities. By denying petitioners' motion to intervene, the district court refused to recognize the absolute right of non-minorities to be represented in the settlement of discrimination suits and to be given an opportunity to propose less burdensome alternatives. In his concurring and dissenting opinion in Franks v Bowman Transportation Co., Justice Burger appropriately objected to the practice of allowing discrimination to be shifted from one group of innocent

employees to another group of equally innocent employees as "robbing Peter to pay Paul". 424 U.S. 747, 781 (1976). Clearly, Weber's directive that an affirmative action plan must not "unnecessarily trammel the interests of the white employees" will be rendered meaningless unless non-minority employees have an absoute right to intervene to protect their interest from impairment in employment discrimination suit settlements.

Petitioners in the lower courts also satisfied the second requirement of Rule 24(a)(2) by demonstrating that the consent decree "may as a practical matter impair or impede" their ability to protect their interests. Since a consent decree approved by the court which includes a twenty percent promotional goal is immune from collateral attack by non-minority employees, an absolute right

to participate in the drafting of such a consent decree would afford the only chance for non-minority employees to vindicate their interests. See generally Cascade Natural Gas Co. v. El Paso Natural Gas Co., 386 U.S. 129 (1967); Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977).

II. A Defendant-Employer Cannot Adequately Represent Non-minority Employee Interests in the Settlement Stage of an Employment Discrimination Suit Because of Adverse Interests.

Some doubt exists whether the applicant for or opponent of intervention bears the burden of proving or disproving inadequate representation under the third

requirement of Rule 24(a)(2).[1] At any rate, the applicant's burden is "minimal". Trbovich v. U.M.W., 404 U.S. 528, 538 n.10 (1972). An applicant for intervention as of right fulfills the requirement by showing that representation of his interest may be inadequate. Id.

Generally, a state, or governmental body or officer, is presumed to adequately represent the interests of its citizens. See Bolden v. Pennsylvania State Police, 578 F.2d 912, 923 (3d Cir. 1978). However, when the state acts in a proprietary role, different considerations apply. When the state is

1. Compare Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967) (burden on opponents to show adequate representation) with Blanchard v. Johnson, 532 F.2d 1074, 1077 (6th Cir.), cert. denied, 429 U.S. 834 (1976); Afro Am. Patrolmen's League, 503 F.2d at 298; Edmondson v. Nebraska ex rel. Meyer, 383 F.2d 123 (8th Cir. 1967) (inadequacy is a necessary element movant must show).

sued in its private capacity as an employer, it makes little sense to presume that it adequately represents the interests of its adversaries, namely its employees. In the context of an employment discrimination suit wherein an employer may be forced to make large concessions to one group of employees at the expense of another, all employees are potential adversaries. In the instant case, the Fire Department's interests were not clearly adverse to those of the white firefighters until the Department began to negotiate and ultimately signed a consent decree. At this juncture, the presumption of adequacy vanished.

Clearly, the defendant employer in this litigation not only could not, but did not, adequately represent the incumbent non-minority employee interests because the record in this case does not even support the entry of a consent

decree establishing promotion goals. Before a court can grant any relief in a Title VII suit, it must find that the defendants engaged in the unlawful employment practice alleged in the complaint. Myers v. Gilman Paper Corp., 544 F.2d 837 (5th Cir. 1977), cert. dismissed, 434 U.S. 801 (1978) (citing 42 U.S.C. §2000e-5(g)). As the court noted in Myers:

> There is an important reason for distinguishing between past and present discrimination, for different remedies are involved. Backpay is the remedy for past wrongs; injunctive and other equitable relief is the remedy for continuing wrongs.

544 F.2d at 854 (emphasis added) (citing Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974), cert. denied, 439 U.S. 1115 (1979)).

The district court in its order denying the motion to intervene in the instant case made no findings of past and continuing discrimination in promotions

to warrant the equitable relief imposed and Title VII does not allow preferential promotion to individuals not shown to be victims of past discrimination. Albermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). Therefore, the district court erred in granting class-based relief to persons who are not identifiable victims of specific discrimination. This error was in part due to the inadequate representation of petitioners' interest.

Although the court may consider a twenty percent minority promotional goal to have less impact on non-minority employees than a "quota", every incumbent non-minority employee who is passed over for a position which he would have received prior to the implementation of the consent decree goals will be placed at a disadvantage in all future promotions, in pension rights, and in all

future matters affecting his career, including his compensation. This impact can only result in adverse effects upon the morale of the Fire Department, a factor considered important by the court in Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission, 482 F.2d 1333, 1341 (2d Cir. 1973), cert. denied, 421 U.S. 991 (1978).

As Justice Powell stated in Bakke, "[w]hether [the] limitation is described as a quota or goal, it is a line drawn on the basis of race and ethnic status". The label is a "semantic distinction" which is "beside the point"; the "good faith" requirement eliminates any distinctions. Regents of the University of California v. Bakke, 438 U.S. 265, 289 (1978). The impact of promotion goals, like quotas, is harsh and can only exacerbate rather than diminish racial attitudes among non-minority employees

who have embarked on a fire department career with the expectation of advancement only to be thwarted because of their race. See Bridgeport Guardians, 482 F.2d at 1341.

As the Sixth Circuit Court of Appeals pointed out in Detroit Police Officers' Association v. Young, 608 F.2d 671 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981) the district court must consider the factors enumerated in the Weber opinion in ruling in employment discrimination cases. Petitioners submit that the full extent of the hardship to be borne by non-minority employees in this case could not be and was not determined prior to the entry of the consent decree because of the inadequate representation of petitioners' interests. Such a determination must be made in order to meet the Weber standard, that is, to insure that "the plan does not

unnecessarily trammel the interests of the white employees" (emphasis added).

III. Timeliness for the Purposes of Rule 24(a)(2) Begins to Run in an Employment Discrimination Suit When Representation Becomes Inadequate.

Not only must an applicant meet the requirements of interest, impairment, and lack of adequate representation, but the applicant also must file a motion to intervene in a timely manner under Rule 24(a)(2). Four critical factors govern the timeliness inquiry:[2]

1. Initially a court must consider the length of time that an applicant either knew or reasonably should have known of his interest in the

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2. Although the Eighth Circuit in Nevilles v. EEOC, 511 F.2d 303 (8th Cir. 1975) (per curiam), has advanced an alternative timeliness test, the Stallworth test with its four factors, is appropriate. Accord, Culbreath v. Dukakis, 630 F.2d 15 (1st Cir. 1980).

case, before he sought to intervene. United Air Lines v. McDonald, 432 U.S. 385 (1977); Michigan Association for Retarded Citizens v. Smith, 657 F.2d 102 (6th Cir. 1981); Stallworth v. Monsanto Co., supra. In NAACP v. New York, 413 U.S. 345 (1973), the Court suggested that promptness can be measured from the time a proposed intervenor learns that litigation is pending.[3]

3. See 413 U.S. at 366. Although NAACP could be read to suggest a different triggering date, that opinion has been described as "subgeneris", largely because of the urgency of expediting the case due to an impending primary election, and because of the NAACP's ability to renew its motion at a later time. Jones, Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action, 14 Harv. Civ. Rights. - Civ. Lib. L. Rev. 31, 82 (1979). Justice Brennan's dissent in NAACP also suggests the limited scope of the decision: "The case plainly turns on its facts, and its impact on the development of principles governing intervention will doubtless be small." 413 U.S. at 373.

However, as the Fifth Circuit points out in Stallworth, supra, the Supreme Court in United Air Lines, supra, a more recent opinion than the NAACP v. New York decision, measured promptness from the time the applicant first learned that her interests "would no longer be protected by the named class representatives", rather than from the time she first learned of the lawsuit. Stallworth, 558 F.2d at 264. Knowledge that litigation is pending is pertinent to Rule 24's timeliness requirement only when its acquisition coincides with an applicant's realization that his interests are threatened and unprotected by existing parties.

2. A court must also consider whether the existing parties will suffer prejudice from an applicant's

"failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case". Id. Culbreath v. Dukakis, 630 F.2d 15, 21 (1st Cir. 1980); Stallworth, 558 F.2d at 65. The prejudice inquiry is narrow; only that prejudice attributable to a movant's failure to act promptly may be considered. The broader factor of prejudice that may flow from the intervention itself does not weigh in the balance. A broad examination of prejudice is appropriate only when a court considers a motion for permissive intervention under Rule 24(b), which expressly directs the court to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties".

See Note, The Timeliness Threat to Intervention, 89 Yale L. J. 586 (1980). Rule 24(a)(2) does not contain similar language and should not be interpreted in a similar way.

3. The third factor a court must consider is whether the applicant will be harmed if he is not allowed to intervene. Stallworth v. Monsanto Co., supra. Principles of basic fairness should guide a court in determining whether an applicant should have an opportunity to be heard.

4. Fourth, a court must evaluate any unusual circumstances militating either for or against intervention. Michigan Association for Retarded Citizens v. Smith, supra. In Retarded Citizens Judge Phillips stated a court should also consider

> the purpose for which intervention is sought. This purpose may, in a given case, tip the balance in favor of timeliness.

With regard to the first factor to be considered under the timeliness inquiry, the court of appeals held that time starts to run against an applicant when he first learns of the proceedings. The Fifth Circuit rejected this very rule for fear that it

> . . . would encourage individuals to seek intervention at a time when they ordinarily can possess only a small amount of information concerning the character and potential ramifications of the lawsuit, and when the probability that they will misjudge the need for intervention is correspondingly high . . . Such a rule would also mean that many individuals who excusably failed to appreciate the significance of a suit at the time it was filed would be barred from intervening to protect their interests when its importance became apparent to them later on.

Stallworth, 558 F.2d at 265. See also United Air Lines v. McDonald, 432 U.S. at

394 n.15. The district court in the instant case rejected petitioners' assertions that the consent decree: (1) notified them for the first time that their interests were threatened and not adequately represented; and (2) triggered their right to intervene. The district court incorrectly measured timeliness from the moment the petitioners could have learned that the lawsuit was pending. Such a rule is unsound and unfair for two reasons. First, it is so conjectural that it is meaningless. Any applicant who moved to intervene in a proceeding asserting a possibility that his interests might be affected by some aspect of a future judgment would face an uphill battle indeed to satisfy Rule 24(a)(2)'s interest, inadequacy, and impairment requirements. The Rule requires a showing beyond a merely speculative interest. See, e.g., Penick

v. Columbus Education Association, 574 F.2d 889 (6th Cir. 1978). Second, petitioners are concerned only with the fairness and operation of the twenty percent goal, which first surfaced publicly when the consent decree was published on April 25, 1980.

The record does not support the district court's comment that petitioners "adopted a wait-and-see posture". (Appendix D, p. 85). Petitioners did not learn about the consent decree and the adverse impact of its promotional goals until copies were posted in each firehouse. Nothing in the record shows that petitioners knew about the decree itself, let alone its potential impact on them, before April 25. Therefore, petitioners acted promptly by filing their motion two weeks after they first saw the decree on the firehouse wall.

An agreement to settle bitterly contested litigation by consent decree is in itself an event that will trigger the need and the right to intervene. Generally, it has been held that intervention is timely and permissible even after parties have agreed to settle litigation by decree. In Piambino v. Bailey, 610 F.2d 1306 (5th Cir.), cert. denied, 449 U.S. 1011 (1980), the Fifth Circuit held that a non-party's right to intervene was triggered by the publication of an adverse settlement agreement. In Baker v. City of Detroit, 504 F.Supp. 841 (E.D. Mich. 1980), the court awarded attorneys' fees to a group of black police officers who had intervened in a reverse discrimination suit to protect their interests. Although timeliness was not at issue in Baker, intervention was granted three years after the suit was filed, virtually

on the eve of trial. The lower court decisions in the instant case place an unfair and unjustifiable burden on a potential intervenor to predict the likely outcome of a complex case, well before the issues have crystallized. Furthermore, the lower court decisions deny to unrepresented persons the right to challenge broad remedies which may impinge upon their interests.

As to the second factor to be considered under the timeliness inquiry, the district court erroneously considered the prejudice existing parties would suffer if intervention were allowed. The law in the Sixth Circuit announced in Retarded Citizens, supra, is clear: a judge may consider only that prejudice the original parties would suffer from a proposed intervenor's failure to move promptly after he knew or reasonably should have known that his interests were

threatened. In short, the prejudice inquiry is narrow -- limited to such considerations as the disappearance of evidence and the unavailability of witnesses. United Air Lines v. McDonald, 432 U.S. at 393 n.14. This element of the timeliness inquiry does not permit broad assessments of the fairness to existing parties of the substance of an intervenor's challenge.

The district court failed to examine as required by the third factor under the timeliness inquiry whether, and to what extent, petitioners would be harmed should intervention be denied. The court summarily concluded that the decree "does not necessarily [sic] trammel the interests of non-minorities in promotion". (Appendix D, p. 85). Without more, petitioners can only speculate whether the court implicitly found that they would not be harmed.

Finally, the district court neglected to consider the fourth factor under the timeliness inquiry, that is, whether special circumstances militated either for or against a finding of timeliness. One factor strongly supports petitioners' motion: the limited role they wish to play as intervenors. They did not object to entry of the decree, nor did they try to delay the proceedings. They merely asked to participate in fashioning an equitable system for future promotions that would not shift the entire burden of remedying any past discrimination to white firefighters. Given this limited role, petitioners could have helped all parties in shaping a better remedy.

Intervention at the remedial stage of complex litigation is often particularly appropriate because it can provide a court with information

necessary for an informed judgment. As Judge Robinson observed in Hodgson v. United Mine Workers of America, 473 F.2d 118, 129 (D.C. Cir. 1972): "Timeliness presents no automatic barrier to intervention in post-judgment proceedings where substantial problems in formulating relief remain to be resolved." See also Cascade National Gas Corp. v. El Paso Natural Gas Corp., supra; EEOC v. AT&T, supra; System Federation No. 91 v. Reed, 180 F.2d 991 (6th Cir. 1950). The lower courts in this case failed to appreciate the importance of post-judgment intervention when difficult remedial problems are presented. Had intervention been granted in this case, limited to discovery and a hearing describing and supporting alternative promotional plans, the district court could have resolved the merits of the proposals in short order, with little or no delay.

Finally, the course of subsequent events in the present case also tips the scale in favor of intervention. The Sixth Circuit heard this appeal together with an appeal on the merits of the Stotts litigation[4] challenging a recent modification of the 1980 decree. The court affirmed modification of the decree.[5] The minority class representatives sought a preliminary injunction prohibiting the Fire Department from using a "last hired-first fired" formula to lay-off employees in response to an announcement made early in 1981 that the City of Memphis planned to

4. Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982); Stotts v. Memphis Fire Dep't, 679 F.2d 579 (6th Cir. 1982).

5. Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982).

lay-off active personnel because of fiscal problems. The City intended to implement this lay-off policy by measuring seniority on a City-wide basis. Under the plan, those employees whose jobs were in danger of elimination who had sufficient seniority could choose to be demoted rather than laid-off.

On May 4, 1981, the district court temporarily restrained the Department from laying off or demoting blacks occupying certain positions within the Department. On May 5, 1981, the firefighters' Union intervened by consent of the parties, asserting that lay-offs must be made according to city-wide seniority, as provided by the union's memorandum of understanding with the City. After additional hearings, the court issued a preliminary injunction prohibiting use of any lay-off policy that would decrease the percentage of

blacks employed in eleven job categories. The district court's injunction rested in part on the conclusion that the City's seniority system was not bona fide because of its discriminatory effect.

Finally, on June 28, 1982, the district court entered an order enjoining the City from proceeding with thirty-three proposed promotions. The court ordered two blacks to be promoted in lieu of two whites in two job classifications. (Appendix F).

It is clear from these events that the Memphis Fire Department litigation has an ever-widening impact on non-minority employees. The consent decree has been modified - an extraordinary remedy - to reach employment practices that the original settlement did not encompass. No provision was made in either the 1974 or the 1980 decree for lay-off procedures, rank reductions, or

demotions. The union has been allowed to intervene to contest the effect that the modified decree will have on its memorandum of understanding. Petitioners should have the opportunity to present and protect their interests, too, particularly in light of the fact that the decree continues to be modified. Indeed, the need for intervention becomes more acute when a court exercises its supervisory powers to alter a consent decree. See Bolden (Garth, J. concurring in part, dissenting in part) supra; United States v. Reserve Mining Co., 56 F.R.D. 408 (D. Minn. 1972).

By granting the motion to intervene to petitioners, the district court would have acquired the opportunity to consider the adverse impact of its consent decree on non-minority employees and to determine to what extent that impact was "unavoidable". Admittedly, a district

court faces a difficult task in balancing the competing interests of minority advancement and majority expectations. However, just as the Sixth Circuit Court of Appeals has recognized, "reconciliation" of these competing interests, while difficult, is "not impossible". Meadows v. Ford Motor Co., 510 F.2d 939, 949 (6th Cir. 1975) cert. denied, 425 U.S. 998 (1976). At a minimum, all parties whose interests will be affected by a consent decree should be represented at some stage of the proceedings. Abt, Consent Decrees: Can They Withstand The Charge of Reverse Discrimination?, 19 Santa Clara L. Rev. 115, 139 (1979). In remanding the Meadows case to the district court, the Sixth Circuit Court of Appeals directed that "notice should be given to the employees likely to be affected and intervention should be allowed from

appropriate representatives" in attempting to reconcile the interests of minority and non-minority employees. Meadows, 510 F.2d at 949. Petitioners ask for no more and no less in the case at hand.

The time has come for this Court to define the line of demarcation between permissible and impermissible affirmative action plans by recognizing the absolute right of non-minority employees to intervene to represent their interests in the settlement of employment discrimination suits. Only through the recognition of such a right can the Court give meaning to the important requirement that remedies for past race discrimi-nation "not unnecessarily trammel the interests of the white employees".

CONCLUSION

For the reasons stated above, D. L. Orders, et al., respectfully request this court to grant their petition in this case for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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August 1982.

CERTIFICATE OF SERVICE

A true copy of this pleading or instrument has been properly served by hand upon the following attorneys or solicitors for all interested parties: Richard B. Fields, 525 Commerce Title Building, Memphis, TN, 38103, and Clifford D. Pierce, Jr., Room 125 N. Main, Room 314, Memphis, TN, 38103.

This 4 day of August, 1982.

J. B. Cobb

J. B. Cobb